

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-013553

11/06/2013

HONORABLE LISA DANIEL FLORES

CLERK OF THE COURT
S. Uppendahl
Deputy

GUILLERMO ORTEGA, et al.

LANCE R BROBERG

v.

ZAVIER K HAFIZ, et al.

JEFFERSON R HAYDEN

MINUTE ENTRY

The Court heard oral argument on Plaintiffs' Verified Application for Temporary Restraining Order, Preliminary Injunction and Order to Show Cause, filed October 8, 2013, seeking to prevent Defendant RLS from pursuing a Trustee's sale of Plaintiffs' home. At Defendant RLS' request, the Court shall rule only on the TRO request at this time and permit the parties an opportunity to determine whether discovery or an evidentiary hearing is necessary before entering a preliminary injunction.

The criteria for granting injunctive relief are 1) a strong likelihood of success on the merits; 2) the possibility of irreparable harm to the plaintiff if relief is not granted; 3) a balance of hardships favoring the plaintiff; and 4) (where applicable) public policy favoring the injunction. *Arizona Association of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 219 P.3d 216 (App. 2009). Injunctive relief is an equitable remedy, and one who seeks equity must do equity. *Ahwatukee Custom Estates Management Association, Inc. v. Turner*, 196 Ariz. 631, 2 P.3d 1276 (App. 2000).

The undisputed facts (supported by the documents attached to the parties' papers) are

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that Plaintiffs purchased a home from Defendant Hafiz (who did not participate in the hearing). All documents related to Plaintiffs' purchase were dated November 21, 2011, and Plaintiffs possessed and occupied the property beginning that day. Neither Hafiz nor Plaintiffs recorded the Note and Deed of Trust or the Warranty Deed related to the transaction. Approximately five months later, Hafiz obtained a loan from Defendant RLS for \$290,000, secured by seven properties that Hafiz represented he owned. One of the seven properties encumbered in this transaction was the home Plaintiffs purchased from Hafiz. In an e-mail to RLS dated April 30, 2012, Hafiz stated: "how much \$\$ do u need..these are pretty much take out loans..all occupied w/ tenants hoping to not come in w/ anything. Would prefer one loan w/ release previsions and 3k fee." RLS did a title search and found that Hafiz (through Omar Capital Group, Ltd.) had title to the home Plaintiffs occupied and inquired no further as to whether Plaintiffs had any legal interest in the property. When Hafiz defaulted on the loan from RLS, the lender noticed a Trustee's sale of Plaintiffs' property.

For reasons more fully stated in Plaintiffs' papers and at oral argument, the Court finds that there is a strong likelihood that Plaintiffs will succeed on the merits. Plaintiffs open, visible and exclusive possession and occupancy of the home created a duty for RLS to inquire further as to Plaintiffs' interest therein. In addition, Hafiz' e-mail stating that the properties were "occupied w/ tenants" created a duty for RLS to inquire as to the "tenants'" interest in the property. See *Roy & Titcomb v. Villa*, 37 Ariz. 574, 296 P.260 (1931). Instead of inquiring directly of those in possession of the home, or even requiring a copy of the lease from Hafiz, RLS accepted at face value Hafiz's vague e-mailed statement that "all [properties offered as security] occupied w/ tenants." This does not amount to "reasonable inquiry."

In *Valley Nat. Bank of Ariz. v. Avco Develop. Co.*, 14 Ariz. App. 56, 480 P.2d 671 (1971) the Court held that no duty of further inquiry is required where the possessor's possession is consistent with the record title. Where, as here, Plaintiffs were in possession and the recorded title was in Hafiz, the duty of further inquiry remained in place precisely to prevent what happened here – Hafiz was not truthful about Plaintiffs' interest. Because RLS failed to undertake any reasonable inquiry to confirm or even clarify Hafiz' vague statements about "tenants" occupying the property, RLS is charged with having constructive notice of Plaintiffs' interest in the home. See *Keck v. Brookfield*, 2 Ariz. App. 424, 409 P.2d 583 (1966).

Because RLS had constructive notice of Plaintiffs' interest in the home, ARS § 33-412(B) applies, and the unrecorded warranty deed is valid and binding as to RLS.

The Court further finds that irreparable injury would result to Plaintiffs if the requested relief is not granted because they would lose their home for which there is no adequate remedy at

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law.

The Court further finds that the balance of hardships is in Plaintiffs' favor. As stated above, Plaintiffs stand to lose their home. RLS' potential loss is related only to the cost of delaying the Trustee's sale of Plaintiffs' property, which is one of seven parcels that secured the loan to Hafiz.

The Court finds that the public interest does not clearly support either party.

Based on the findings stated above,

IT IS ORDERED granting Plaintiffs' request for a Temporary Restraining Order, enjoining Defendant RLS Capital, LLC, together with their attorneys, agents, servants, employees, assignees and any other person in active concert or participation with RLS, from any further attempts or actions to foreclose and resell the real property at issue in this matter, until further order of the Court. This order shall expire ten business days from the date it is entered (filed by the Clerk) unless, for good cause shown, it is extended for an additional ten days or RLS consents to a longer extension.

IT IS FURTHER ORDERED setting bond in the amount of \$500 due to the minimal potential loss to RLS if this TRO was issued in error. The bond shall be posted no later than November 15, 2013. Failure to post the bond shall result in the TRO being dissolved.

IT IS FURTHER ORDERED that, because the Trustee's sale is currently set less than 48 hours from the time of filing of this order, the TRO shall become effective immediately even if Plaintiffs are unable to post the bond prior to the scheduled Trustee's sale.

IT IS FURTHER ORDERED setting Telephonic Status Conference on **November 12, 2013 at 10:00 a.m.** to set an Evidentiary Hearing, if necessary, on Plaintiffs' request for a Preliminary Injunction. Plaintiff's counsel shall initiate the call to the Court by calling (602) 372-0825.

/s/ HONORABLE LISA DANIEL FLORES
HON. LISA DANIEL FLORES
JUDICIAL OFFICER OF THE SUPERIOR COURT

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ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.